IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 720 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL and
MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

THAKORE GOPALJI MOPTAJI AND OTHERS

Versus

STATE OF GUJARAT

Appearance:
MR. K.G. SHETH, advocate for the appellants.
MR. S.R. DIVETIA, A.P.P. for the respondent.

CORAM : MR.JUSTICE J.M.PANCHAL and
MR.JUSTICE M.H.KADRI

(June 28,1996)

ORAL JUDGMENT : (Per: Panchal,J.) :-

By means of filing this appeal under section 374 of the Code of Criminal Procedure,1973, the appellants, who are original accused, have challenged legality and

validity of judgment and order dated September 6,1989 rendered by the learned Additional Sesssions Judge, Mehsana, in Sessions Case no.163/88 convicting them under section 302 read with section 34 of the Indian Penal Code and sentencing them to R.I. for life.

2. The prosecution case in brief is that original informant Amaratji Visaji was residing in Thakore-vas at village Vansol, Taluka : Kadi, District :Mehsana. In the same locality, his father, mother and three brothers were residing in another house. The complainant was storing fire woods in open near Osari of his house and those fire woods were being stolen. He had suspicion that accused no.2 i.e. Thakore Udaji Gopalji was stealing the same. The incident took place on July 16,1988. On that day, in the evening, the complainant found accused no.2 loitering near his house. Under the circumstances, the complainant entertained a suspicion that accused no.2 was attempting to steal fire woods. The complainant, therefore, came out of the house and scolded accused no.2. Thereafter the complainant went to the house of accused no.1, who is father of accused no.2 and requested accused no.1 to scold accused no.2, as accused no.2 was committing theft of fire woods. Thereupon accused nos.1 & 2 got enraged and abused the complainant. The complainant feared that he would be belaboured. Therefore, he went to the house of his father which was situated near the house of the accused. The complainant informed his father that the accused were enraged and about to beat him, as he had made complaint against accused no.2. The father of the complainant, therefore, came out of house and asked the accused not to quarrel. It is the case of the prosecution that thereupon all the four acused got enraged. The accused no.1 who was armed with dharia, gave dharia blow to deceased Visaji, father of the complainant and it landed on left side of his chest. The other accused beat the deceased with sticks. On receiving injuries, deceased fell down. On hearing hubbub, Thakore Gafurji Pratapji and Thakore Bharatji Mansangji etc. residing nearby also collected at the scene of offence. The complainant thereafter informed his uncle Raijiji Varvaji. Injured Visaji was removed to Government Dispensary, Kadi in a tractor. The doctor on duty examined Visaji and declared him dead. In the night itself at about 3.15 A.M. Amaratji lodged First Information Report with Kadi Police Station. The First Information Report was registered by Virambhai Rajsihbhai Agath, who was then discharging duties as Police Sub Inspector, Kadi Police Station. After registering the complaint, investigation was commenced. The investigating officer, in presence of

panchas, prepared inquest report and sent the dead body for postmortem. Dr. Chaturbhai Savabhai Parmar, medical officer, Kadi Municipal General Hospital performed autopsy on the dead body. The medical officer also issued postmortem notes. The investigating officer recorded statements of several witnesses. On completion of investigation, the accused were chargesheeted under section 302 read with section 34 of the Indian Penal Code. As the offences were exclusively triable by a Court of Sessions, the case was committed to Sessions Court for trial.The learned Additional Sessions Judge, Mehsana framed charge against the accused at exh.4 under section 302 read with section 34 of the Indian Penal Code. The charge was read over and explained to the accused. The accused pleaded not guilty to the charge and claimed to be tried. The prosecution, therefore, examined following witnesses in order to prove its case against the accused :-

(1) Amaratji Visaji, PW 1, ex.11.
(2) Thakore Gafurji Pratapji, PW 2 ex.13
(3) Dr.Chaturbhai Savabhai parmar, PW 3,ex.14
(4) Thakore Bharatji Mansangji, PW 4, ex.16
(5) Thakore Raijiji Varvaji, PW 5, ex.17
(6) Maljibhai Gobarbhai Desai, PW 6, ex.21
(7) Dr. Bachubhai Becharbhai Patel, PW 7, exh.25
(8) Bhikhaji Galbaji Thakore, PW 8,ex. 28
(9) Sulemanbhai Dosabhai Mansuri, PW 9, ex.30
(10) Thakore Gambhirji Mafaji, PW 10, ex.32
(11) Virambhai Rajsihbhai Agath, PW 11, ex. 34.

The prosecution also relied on postmortem notes, panchnama of scene of offence, inquest report etc. in order to prove its case against the accused.

3. After recording of evidence of prosecution witnesses was over, the learned Judge recorded statements of the accused under section 313 of the Code of Criminal Procedure, 1973. In their statements under section 313, the accused stated that the case against them was false. Though the accused did not lead any defence evidence, they filed written statement at exh.43.

4. After appreciating the evidence, the learned Judge recorded the following conclusions :-

(1) Deceased Visaji Varvaji died homicidal death which is amply proved by evidence of complainant Amaratji and other witnesses as well as by evidence of Dr.Chaturbhai Savabhai Parmar, PW 3, exh.14 read together with postmortem notes exh.14, (2) The evidence of complainant Amaratji Visaji, PW 1, exh.11 clearly indicates that accused no.1 had given dharia blow on left

side chest of deceased Visaji, whereas the other accused had given stick blows to the deceased, (3) The incident in question had taken place near the house of deceased Visaji Varvaji, which is evident from the map of scene of offence produced by the prosecution at exh.19 and panchnama of scene of offence exh.29, (4) The evidence of complainant Amaratji Visaji is completely corroborated by the First Information Report which is produced on record at exh.12, (5) The evidence of complainant Amaratji Visaji also gets corroboration from the evidence of eye witnesses (i) Thakore Gafurji Pratapji, PW 2,ex.13 and (ii) Thakore Bharatji Masangji, PW 4, ex.16, (6) Though accused nos.1 & 4 had sustained injuries, they were minor in character and it was not shown that they had received injuries in the incident and, therefore, non-explanation of injuries by the prosecution witnesses is not fatal to the prosecution, (7) The accused were duly armed with weapons and caused injuries to deceased Visaji Varvaji. The injury caused by accused no.1 was sufficient in the ordinary course of nature to cause death and, therefore, common intention of all the accused was to cause death of Visaji Varvaji, (8) The prosecution has proved beyond reasonable doubt that the accused committed offence under section 302 read with section 34 of the Indian Penal Code, and (9) the ingredients of offence under section 504 of I.P.C. are not proved by the prosecution and, therefore, the accused cannot be convicted under section 504 of I.P.C.

5. In view of the above referred to conclusions, the learned Judge acquitted the accused of the offence punishable under section 504 of the Indian Penal Code, but convicted them under section 302 read with sec. 34 of I.P.C. and imposed sentence which is referred to earlier, giving rise to the present appeal.

6. Mr. K.G.Sheth, learned Counsel appearing for the appellants has taken us through the entire evidence on the record. Learned Counsel for the defence submitted that the incident had taken place near the house of the accused and, therefore, prosecution having suppressed genesis of the incident, the appeal deserves to be allowed. It was pleaded on behalf of the appellants that postmortem notes exh.14 do not indicate in any manner that the deceased had sustained injuries which could have been caused by means of sticks and as eye witness account is not corroborated by medical evidence, appellants no.2, 3 & 4 should have been acquitted by the learned Trial Judge. Learned Counsel for the appellants asserted that this is a case of false implication and in view of certain contradictions in evidence of the complainant as

well as other eye witnesses, the appeal should be accepted by this Court. It was emphasised on behalf of the appellants that having regard to the nature of evidence led by the prosecution, it is evident that there was a sudden fight between the accused and deceased and a scuffle had ensued between them and, therefore, the conviction recorded by the learned Trial Judge deserves to be set aside. After referring to injury certificate exh.26 as well as another certificate produced at exh.27, it was pleaded on behalf of the appellants that the accused nos.1 & 4 had sustained injuries, but prosecution witnesses have not explained those injuries in evidence, which in turn would indicate that the prosecution has suppressed genesis as well as origin of occurrence and has also not presented true version of the incident and, therefore, the appeal should be allowed. In the alternative, it was pleaded that only one blow was given by accused no.1 to deceased Visaji Varvaji and, therefore, conviction under section 302 read with section 34 of I.P.C. should be converted into one under section 304 Part-II of I.P.C.

7. Mr. S.R.Divetia, learned Additional Public Prosecutor on behalf of the State contended that the evidence of complainant Amaratji Visaji is amply corroborated by his complaint exh.12 as well as the evidence of two eye witnesses, namely, Thakore Gafurji Pratapji and Thakore Bharatji Mansangji and, therefore, the appeal should not be accepted by the Court. On behalf of the prosecuting agency it was pleaded that the eye witness account clearly indicates that the accused no.1 had given dharia blow on left side chest of deceased Visaji; whereas rest of the accused had assaulted the deceased with sticks and as the version that accused nos.2,3 & 4 had assaulted deceased Visaji Varvaji with sticks gets corroboration by the evidence of witness Sulemanbhai Dosabhai Mansuri, PW 9, ex.30, who has proved the inquest panchnama exh.31 the conviction of appellants nos.2,3 and 4 recorded by the learned Trial Judge should not be upset by this Court. The learned Additional Public Prosecutor argued that the map and panchnama of scene of offence indicate that the incident had taken place near the house of the deceased and not near the house of the accused as suggested by the defence, which clearly proves that the accused were aggressors. On behalf of the State Government, it was emphasised that injuries sustained by accused nos.1 & 4 were minor in nature and it was not shown that they had received injuries in the alleged incident and, therefore, non-explanation of injuries is of no conseuqnece to prosecution case. Learned Counsel for the State

Government referred to postmortem notes in detail and submitted that serious injuries were caused to deceased Visaji by accused no.1 with dharia, which resulted into instantaneous death and, therefore, offence would be under section 302 read with section 34 of I.P.C. and not under section 304 Part-II of I.P.C.

The fact that deceased died a homicidal death is not disputed on behalf of the appellant. Even otherwise that fact is amply proved by medical evidence and post mortem notes read with evidence of eye witnesses. Therefore, the finding recorded by the learned Judge that deceased died a homicidal death is hereby upheld.

8. We have perused the evidence on record carefully. Amaratji Visaji, PW 1, ex.11 has stated in his evidence that as he had suspicion that accused no.2 was stealing fire woods,he had gone to the house of father of accused no.2 and requested him to scold accused no.2. His evidence further shows that thereupon accused no.1, who is father of accused no.2 as well as accused no.2 were enraged and abusing him. His evidence indicates that he entertained a reasonable belief that he would be belaboured by the accused and, therefore, he went to the house of his father which was nearby. In his evidence this witness has stated that he informed his father that the accused were likely to beat him, as he had made complaint against the accused no.2. The evidence of the complainant further shows that thereupon the deceased had come out of house and scolded the accused and, therefore, accused no.2 armed with dharia and other accused armed with stick went to the house of the deceased. In his evidence, this witness has clearly stated that accused no.1 gave dharia blow on left side chest of the deceased; whereas other accused assaulted the deceased with sticks, as a result of which his father fell down. The witness has testified before the Court that because of commotion, Bharatji Masangji, Gafurji Pratapji etc. residing nearby, had come to the scene of offence. The witness has thereafter stated that the deceased was removed to Hospital situated at Kadi where medical officer on duty declared the deceased dead. In his evidence before the Court he has further stated that thereafter he had gone to Kadi Police Station for giving information about the incident which was recorded by the Police Sub Inspector. Though this witness has been cross-examined searchingly at lenght, nothing has been brought on record to shake his version given on oath. In his cross-examination, the witness has stated that he had never seen accused no.2 taking away fire woods. He has also stated that he had not raised any shouts at the time when his father was assaulted by the accused. This witness has denied the

suggestion made to him that a scuffle had ensued between the accused and the deceased and, therefore, deceased received injuries. The witness has produced complaint filed by him at ex.12. The complaint completely corroborates him. In the complaint, the cause of incident, names of accused, part played by the accused, names of witnesses etc. are stated. It is relevant to note that after assault on his father, the complainant had gone to call his uncle Raijiji Varvaji, PW 5, ex. 17. Thereafter it was decided to remove his father in a tractor to Kadi Hospital. For this purpose, tractor belonging to one Nenaji Shankerji was used. Nenaji Shankerji was contacted by one Mayurji Moyataji. After arrival of tractor, his father was taken to Kadi Hospital. The evidence of witness Thakore Bharatji Mansangji, PW.4, exh.16 indicates that Kadi is at a distance of 5 to 6 Gaus from Vansol and it would take about 1 to 1-1/2 hours to reach Kadi by tractor. The evidence of the complainant in no uncertain terms shows that they had reached Kadi Hospital at about 1.30 A.M., but because of night hours, Doctor was not available and the Doctor had arrived at the hospital after about 1/2 an hour. His evidence also shows that after his father was declared dead, he had gone to Kadi Police Station for the purpose of giving First Information Report. Thus, the evidence led by the prosecution clearly shows that the First Information Report was lodged without any avoidable delay and is reliable piece of evidence. Under the circumstances, the evidence of the complainant, which is fully corroborated by his complaint, is rightly believed by the learned Judge and we see no reason to set aside the finding recorded by the learned Trial Judge to the effect that evidence of the complainant inspires confidence.

9. The evidence of Thakore Gafurji Pratapji, PW 2, ex.13 shows that he is residing just adjacent to the house of deceased Visaji. He has also stated in his evidence that the incident had taken place at about 10.00 P.M. and on hearing commotion, he had come out of his house. He has further stated taht the deceased was standing near his house and his son Amaratji was also there. His evidence clearly indicates that accused were present there and were abusing the deceased. In his evidence, this witness has stated that accused no.1 was armed with dharia, whereas rest of the accused were armed with sticks. In his evidence, this witness has in no uncertain terms stated that accused no.1 had given blow with dharia on left side chest of the deceased, whereas accused nos.2,3 & 4 were giving blows with sticks. He has also stated that at that time, Bharatji Mansangji was

also present and he as well as Bharatji Mansangji had intervened in the quarrel as a result of which, accused had run away. This witness is also searchingly cross-examined on behalf of the accused, but nothing is brought on record to doubt his version given on oath. It is relevant to note that presence of this witness at the time of incident is not only referred to by the complainant in his evidence before Court, but also referred to in the complaint which was lodged without any avoidable delay. This witness is not related to either the complainant or deceased Visaji. In that sense, he is an independent witness. It is also not brought on record of the case that he had any grudge against the accused. Therefore, the learned Judge cannot be said to have committed any error in placing reliance on the deposition of this witness.

10. The evidence of Thakore Bharatji Mansangji, PW 4 exh.16 indicates that he is also residing near the house of deceased Visaji. He has stated in his evidence that because of quarrel he had come out of his house and seen that the accused were quarreling with the deceased. This witness has also stated that accused no.1 was armed with dharia and other accused were armed with sticks. This witness has further proceeded to state that accused no.1 had given blow with dharia on left side chest of deceased, whereas accused nos. 2, 3 & 4 had given stick blows on thighs. This witness is also cross-examined effectively on behalf of the accused, but nothing is brought on record to shake his version as stated by him in the examination-in-chief. This witness is also an independent witness. He is not related to either the complainant or the deceased. His name also figures not only in the deposition of the complainant and the complaint, but also in the evidence of another eye witness Gafurji Pratapji. On overall view of the matter, we are of the opinion that no error is committed by the learned Judge in placing reliance on the evidence of this witness also.

11. In view of the above referred to evidence led by the prosecution, it is apparent that accused no.1 had caused injury by dharia to the deceased on left side of his chest, whereas accused nos.2,3 and 4 had caused stick injuries. The submission that the incident had taken place near the house of the accused and not near the house of the deceased, which indicates that the deceased and the complainant were aggressors, has no merits. The map of scene of offence was produced by the prosecution with list exh.10. The map of scene of offence is admitted on behalf of the defence and, therefore, the

same has been read in evidence by the learned Judge. A glance at the map of scene of offence clearly indicates that incident had taken place near the house of the deceased and not near the house of the accused. Similarly, the panchnama of scene of offence is proved by the evidence of witness Bhikhaji Galbaji, PW 8 ex.28. The evidence of this witness read together with the contents of panchnama of scene of offence exh.29 makes it abundantly clear that the incident had taken place near the house of the deceased and not near the house of the accused as suggested by the defence. Under the circumstances, the submission that the deceased and complainant were aggressors will have to be rejected.

12. The contention that absence of mention of injuries in P.M.notes on the person of the deceased which could have been caused by means of sticks indicates that the appellants nos.2,3 & 4 had not participated in the crime in question, cannot be accepted. The complainant in his evidence has clearly stated that all the accused had come near the house of his deceased father and accused nos.2,3 & 4 had given stick blows to his father. This fact is also stated by the complainant in his complaint. Two eye witnesses namely, Gafurji Pratapji and Bharatji Masangji have also stated in their evidence before Court that accused nos.2,3 & 4 had assaulted the deceased with sticks. It is true that in the postmortem notes no injuries have been noticed which could have been caused by sticks. However, evidence of Sulemanbhai Dosabhai Mansuri, PW 9 ex.30 indicates that inquest panchnama was prepared in his presence on July 16, 1988 and he had seen black signs on thighs of the deceased. The fact that there were injuries on thighs of the deceased is also mentioned in the inquest report exh.31. It is well settled that a statement in inquest report does not fall within four corners of section 162 of the Code of Criminal Procedure. In fact, documents like the inquest reports, seizure lists or the site plans consist of two parts- one of which is admissible and the other is inadmissible. That part of such documents which is based on the actual observation of the witness at the spot being direct evidence in the case is clearly admissible under section 60 of the Evidence Act, whereas the other part which is based on information given to the investigating officer or on the statement recorded by him in the course of investigation is inadmissible under section 162 of the Criminal Procedure Code except for the limited purpose mentioned in that section. The statement made in inquest report regarding actual observation of the witness at the spot is direct and primary evidence in the case and is in the eye of law, the best evidence.

Unless the record is proved to be suspect and unreliable, perfunctory or dishonest, there is no reason to disbelieve such a statement in the inquest report.(See: Rameshwar Dayal v. State of U.P., A.I.R. 1978 S.C. 1558).

Having regard to the evidence of witness Sulemanbhai Dosabhai Mansuri, PW 9, ex.30, we are of the opinion that it is not shown by the defence that the record is suspect and unreliable or perfunctory or dishonest. There is no reason to disbelieve the statement made in the inquest report. Therefore, the inquest report can be relied on for the purpose of corroborating the evidence of the complainant and other eye witnesses. The evidence of the complainant, contents of the complaint and the evidence of two eye witnesses read with the evidence of witness Sulemanbhai Dosabhai Mansuri, PW.9, ex.30 and contents of inquest panchnama prove beyond reasonble doubt that accused nos.2,3 & 4 had given stick blows to deceased Visaji.

13. Even otherwise also, this submission cannot be accepted. It is well settled that ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye witnesses. Unless, however,the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eye witnesses, the testimony of the eye witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence. Here it is noted that the medical evidence in its turn does not go that far that it completely rules out all possibility of injuries having been sustained by the deceased with sticks. In the case of MAHARAJ SINGH AND ANOTHER v. STATE OF RAJASTHAN, 1981, Criminal Law Journal, 477 the brother of the deceased had stated that hands of the deceased had been tied at his back when he was forcibly taken by the accused into field and shot dead there. The doctor who conducted autopsy did not note or find any imprints of a rope on the wrists of the dead body. The contention raised on behalf of the accused to the effect that in view of the discrepancy between statement of eye witness and medical expert the conviction should be set aside, has been repelled by the Supreme Court in the following manner :-

"In our opinion, the mere fact that the Doctor

who conducted autopsy, did not note or find any imprints of a rope on the wrists of the dead body, is hardly a ground for rejecting the evidence of the eye witnesses to the effect that the hands of the deceased had been tied at his back when he was forcibly taken by the accused into the Arhar field and shot dead there. The discrepancy between statement of eye witness and medical expert was of little importance. Besides, the evidence of this sole eye witness was fully corroborated from the First Information Report and from transferred statements of two other witnesses. His evidence could not be disbelieved merely because he was elder brother of deceased."

14. In view of the above referred to principle laid down by the Supreme Court, we are of the opinion that non-mention of any injuries by stick in the postmortem notes, does not affect the credibility of eye witness account at all to the effect that accused nos.2,3 & 4 had given stick blows to the deceased.

15. The contention that prosecution witnesses have offered no explanation regarding injuries sustained by accused nos.1 and 4 and, therefore, the prosecution case should be disbelieved, is devoid of merits. The evidence of Dr. Bachubhai Becharbhai Patel, PW 7 exh.25 read together with the contents of Certificate exh.26, which is issued regarding injuries sustained by accused no.1 as well as injury certificate ex.27 which is issued regarding injuries received by accused no.4, indicates that both the accused had received simple injuries. The evidence of the Doctor does not indicate that any history of assault was stated by either accused no.1 or accused no.4 when they had approached him for the purpose of treatment. In para-5 of his deposition, the doctor has categorically stated that nature of all the injuries, except wheel mark on the back of accused no.4 is such that they can be termed as self-inflicted injuries. It is not shown by the defence that accused nos.1 & 4 had received injuries mentioned in exh.26 and exh.27 respectively in the incident. Under the circumstances, we are of the opinion that the learned Judge has not committed any error in placing reliance on the decision rendered by the Supreme Court in the case of JAGDISH v. STATE OF RAJASTHAN, A.I.R. 1979 S.C.1010. In the said case, the Supreme Court has emphasised that where serious injuries are found on the persons of the accused as a principle of appreciation of evidence, it becomes obligatory on the prosecution to explain the injuries so as to satisfy the Court as to the circumstances under which the occurrence originated. However, the Supreme

Court has made it very clear that before this obligation is placed on the prosecution, two conditions must be satisfied, viz. (i) that injuries on the person of the accused must be very serious and severe and not superficial,and (ii) that it must be shown that these injuries must have been caused at the time of occurrence in question. In the instant case, the defence has failed to show that injuries on the persons of accused nos. 1 & 4 were very serious and severe. On the contrary, the evidence of Dr. Bachubhai Becharbhai Patel, who treated accused nos.1 & 4, in no uncertain terms shows that injuries sustained by accused nos.1 & 4 were superficial. It is also not shown by the defence that those injuries were caused at the time of occurrence in question. On overall view of the matter, no adverse inference can be drawn against prosecution for not offering any explanation regarding the injuries sustained by accused nos.1 & 4.

16. The submission that as quarrel had taken place between the accused and the deceased who are neighbours which lasted for 15 minutes and as only one blow was given to the deceased, conviction under section 302 read with section 34 I.P.C. should be converted into one under section 304 Part-II of I.P.C., has no merits. The evidence of complainant, contents of complaint, evidence of two eye witnesses, map of scene of offence as well as panchnama of scene of offence indicate that the incident had taken place near house of the deceased and not near the house of the accused. It means that the accused were aggressors. All the accused were duly armed with weapons. The deceased was not armed with any weapons at all. The fact that quarrel had lasted for a period of 15 minutes shows that there was no sudden provocation at all. Under the circumstances, giving of one blow cannot be treated as bringing the case under section 304 Part-II of the Indian Penal Code. The fact that accused had come with arms indicates that they had come with pre-determined mind and shared common intention. It is well settled that where a person causes injuries to another on a vital part with a dangerous weapon, the inference is that he intended to cause death or bodily injury as is likely to cause death and if death ensues as a result thereof, he would be guilty of murder. In any event, his act would betray an intention to cause bodily injury sufficient in the ordinary course of nature to cause death in which event also he would be guilty of murder. This is not a case of crime having been committed without premeditation and in a sudden quarrel or in the heat of passion. The accused came determined to strike, chose the seat of injury and caused fatal

injury on the left side chest of deceased. Dr. Chaturbhai Savabhai,PW 3, ex.14 has testified that the injury was so serious that it must have caused instantaneous death. The postmortem notes show that the deceased had incised wound about 4" in length, 2.5" in width and 1.5" deep on left side chest from 2nd to 5th mid ribs deep to heart. The evidence of Doctor shows that because of dharia injury heart of the deceased was also cut. The cause of death as indicated in the postmortem notes is sudden loss of blood due to cut section of heart. When accused no.1 struck the deceased on a vital part with a dangerous weapon like dharia, the inference is that the accused intended to cause death or bodily injury which was likely to cause death and as death ensued as a result thereof, the accused would be guilty of murder. In any event, the act of the accused would betray an intention to cause bodily injury sufficient in the ordinary course of nature to cause death in which evident also they would be guilty of murder. We are, therefore, of the opinion that the case of the accused squarely falls within the purview of section 300 of the Indian Penal Code.

17. The last submission that accused nos.2,3 & 4 had not shared the common intention of accused no.1 and, therefore, should be convicted for lesser offence, cannot be accepted. Section 34 of the Indian Penal Code reads as under :-

"34. Acts done by several persons in furtherance of common intention:

When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

18. It is well settled that common intention is a question of fact. It is subjective, but, it can be infered from facts and circumstances. Section 34 is to be read along with the preceding section 33, which makes it clear that the "act" spoken of in Section 34 includes a series of acts as a single act. The acts committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise, for instance, one may only stand quard to prevent any person coming to the relief of the victim or to otherwise facilitate the execution of the common design. Such a person also commits an "act" as much as his

co-participants actually committing the planned crime. In the case of an offence involving physical violence, however, it is essential for the application of section 34 that the person who instigates or aids the commission of the crime must be physically present at the actual commission of the crime. Such presence of those who in one way or the other facilitate the execution of the common design, is itself tantamount to actual participation in the 'criminal act'. The essence of section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring such a particular result. Such consensus can be developed at the spot and thereby intended by all of them. On the facts and in the circumstances of the case, it is proved by the prosecution that the appellants are related, all of them were armed with deadly weapons, they were together and had gone together to the house of the deceased. It is also proved that all of them had actively participated in causing injuries to the deceased and after the occurrence, they had left together. The arrest panchnama indicates that they were later on arrested from the said place. In view of the evidence led by the prosecution, we are of the opinion that the appellants no. 2,3 and 4 had caused injuries with a common intention and, therefore, the Trial Court was justified in convicting all the appellants under section 302 read with section 34 of the Indian Penal Code.

For the foregoing reasons, we do not see any merits in the appeal. The appeal, therefore, fails and is dismissed. We affirm conviction recorded and sentence imposed by the Trial Court. Muddamal articles are ordered to be disposed of in terms of direction given by the learned Judge in the impugned judgment.
